IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MACON COUNTY INVESTMENTS, INC. and REACH ONE, TEACH ONE OF AMERICA, INC.,	)	
Plaintiffs,	)	
v.	)	**C.A.N.: 3:06-cv-224-WKW**
SHERIFF DAVID WARREN, in his official capacity as the SHERIFF OF MACON COUNTY, ALABAMA,	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

COME NOW the Plaintiffs, Macon County Investments, Inc. ("MCI") and Reach One, Teach One of America, Inc. ("Reach One, Teach One") and hereby submit this Memorandum Brief in Support of Motion for Reconsideration. The Plaintiffs state the following:

I. STANDARD OF REVIEW

Although district courts are afforded discretion in reviewing a Motion to Reconsider, there are three recognized instances in which a Motion to Reconsider is granted: "1) an intervening change in controlling law; 2) the availability of new evidence; and 3) the need to correct clear error or manifest injustice." *Groover v. Michelin N. Am., Inc.*, 90 F.Supp.2d 1236, 1256 (M.D.Ala.2000). Here, there is a great need to correct clear error to avoid injustice to the Plaintiffs.

Specifically, there are sufficient material facts in the record that clearly establish that the Plaintiffs have standing to pursue this litigation. Further, the Court's holdings and the findings that the Plaintiffs did not challenge the Original Rules and that the Plaintiffs may not have suffered an actual injury are due to be corrected. In light of these errors, the Plaintiffs' Motion to Reconsider should be granted, and the Defendant's Motion for Summary Judgment is due to be denied.

II. THE PLAINTIFFS' CHALLENGE AGAINST THE ORIGINAL RULES WERE INCLUDED IN THEIR CHALLENGE AGAINST THE AMENDED RULES

The Plaintiffs challenged the Original Rules by their challenge of the Amended Rules. The preamble language in the Commentary to the First Amended and Restated Rules provide that the previous rules are "amended and ***restated in their entirety***." Exh. 2, First Amended and Restated Rules. The Commentary to the Second Amended and Restated Rules has similar language. Exh. 3, Second Amended and Restated Rules. In this case, the Original Rules were incorporated as a body into the comprehensive Amended Rules. The First and Second Amended Rules are exactly the same as the Original Rules with the exception of those revisions that made obtaining a Class B Bingo License and becoming a qualified location impossible. *See* 2, First Amended and Restated Rules; Exh. 3, Second Amended and Restated Rules; Exh. 10 Original Rules. The commentary to the First Amended and Restated Rules only lists seven changes to the Original Rules. Exh. 2, First Amended and Restated Rules. The commentary to the Second Amended and Restated Rules only lists three changes.

The Amended Rules subsumed the entire body of Original Rules, to the extent there were no conflicts with the Original Rules. Where there were conflicting provisions, the Amended Rules prevailed. This reasoning is much like the Federal Rules of Civil Procedures treatment of an amended pleading that adopts and incorporates the original pleading. When an original pleading is amended and the original pleading is adopted and incorporated by reference in the amended pleading, the original pleading is subsumed in its entirety in the amended pleading. *See King v. Dogan*, 31 F.3d 344, 346 (5th Cir.1994). As such, any challenge against the Amended Rules would, as a matter of law, be a challenge against the embodied Original Rules.

Contrary to the Court's finding on page 8 of the Memorandum Opinion, the Plaintiffs also challenged the process of the Defendant's rule-making by citing the amendments made to rules every six months. These amendments were arbitrary and capricious by the Defendant's own testimony as he could not articulate a reason for these amendments:

a. The Sheriff stated in his deposition that the 15-applicant minimum was enacted to prevent any abuse that would occur from an operator conducting bingo with just one charity. Exh. 1, Sheriff Depo., p. 148, ln. 4-12. However, the Sheriff could not point to any events or incidents which led him to believe that bingo would be abused in that manner. Exh. 1, Sheriff Depo., p. 148-149, ln. 21-14. Additionally, the Sheriff stated that the number 15 had no real significance.

   Q: Okay, if you don't mind, what's determinative about 15 charities? Why not five? Why not ten? Why not 25?
   A: This was – that was a number I decided on.
   Q: You just woke up one morning and 15 hit the head?
   A: Uh-huh (affirmative).

   Exh. 1, Sheriff Depo., p. 149-150, ln. 20-4.

b. The Second Amended Rules stated that at no time shall there be more than sixty (60) Class B Licenses in Macon County, Alabama. Exh. 3, Second Amended Rules, Section 2. The Sheriff testified that one of the reasons why this change was made was to comply with the Alabama Attorney General's policy to limit bingo gaming activities in Macon County. Exh. 1, Sheriff's Depo., p. 191-192, ln. 2-20. However, the Attorney General articulated no such policy. Exh. 1, Sheriff's Depo., p. 194, ln. 13-16.

c. At the time of the Sheriff's deposition, approximately 62 Class B licenses had been issued, with 60 of those being active. All active licensees are conducting bingo at one qualified location -- Macon County Greyhound Park. Exh. 1, Sheriff's Depo., p. 203, ln. 6-12; p. 214-215, ln. 19-2.

Theses amendments were arbitrary and capricious as the rules were drafted in whole or in part by the Sheriff's attorney who also serves as the attorney for the sole qualified location for bingo gaming in Macon County:

a. The Sheriff attributes much of the drafting of the rules to his attorney or a collaboration with his attorney.

Q: Now, sheriff, these rules were prepared by whom?
A: My attorney.
Q: And that's Fred Gray, Jr.?
A: Uh-huh (affirmative).
…
Q: These rules and regulations, were they drafted by Fred Gray, Jr., your lawyer?
A: Alone?
Q: Yes.
A: I had some input.

Exh. 1, Sheriff's Depo., p. 25, ln. 4-8, p. 26, ln. 6-10. See also Exh. 1, Sheriff's Depo., pp. 62-63, ln. 18-20; p. 150, ln. 6-17.

b. The Sheriff admitted that he knew that his attorney was also representing the Macon County Greyhound Park at the same time that he was being advised on the rules and regulations for bingo gaming in Macon County.

Q: Were you also aware that Fred Gray, Jr. and his law firm have been representing the Macon County Greyhound Park, doing business as Victoryland for several years?
A: Yes.
Q: At times when according to your own testimony, Fred Gray, Jr. was advising you and making recommendations and writing and drafting for you and your initial rules, your first amended rules, his partners and father and brother were representing Victoryland at the same time?
A: Yes
Q: You didn't see a conflict in that? As sheriff, you would be the regulator of Class bingo in Macon County; is that correct?
A: Yes.
Q: And Victoryland has been and still is the only qualified location for a Class B bingo license?
A: Yes.
Q: And the law firms that represent you and Victoryland are one in the same?

A: Yes.

Exh. 1, Sheriff's Depo., pp. 273-274, ln. 11-10.

c. The Sheriff also acknowledges that he believes that one of his attorneys is also a stockholder, investor, member or partner of the Macon County Greyhound Park. Exh. 1, Sheriff's Depo., p. 280, ln. 12-19.

The Plaintiffs challenge of the overall conflicted and corrupted process of drafting and amending rules to create a monopoly equates to a challenge of the Original Rules as well.

III. THE UNDISPUTED EVIDENCE SHOWS THAT PLAINTIFFS' APPLICATION FOR A BINGO LICENSE COMPLIED WITH THE RULES

The Sheriff testified that the Plaintiffs' application substantially complied with rules, and that the application presented him with the information that he needed for an application for a bingo license. The Plaintiffs presented him with the requested information that he needed for an application for a bingo license.

Q: And after your examination of the information provided, does it provide the necessary information that you sought for the application?
...
THE WITNESS: That's different.
Q: But is the information there? Is the information there that you would need?
A: Yes.
Q: Okay. Now, are you interested in – you basically are requesting information, aren't you?
A: Yes.

Exh. 1, Sheriff's Depo., pp. 233-34, ln. 8-4.

Q: So, I guess – is there any objection to the information that was provided to you?
...
A: Other than the order of it.
Q: Sheriff, if I may, you were provided a contents of the bingo application, am I correct?
A: Right, right.

> Q: Clearly delineated under 1 through 18 is a listing of all information that was submitted; am I correct?
> A: Yes.
> ....
> Q: Okay. Then as it relates to the application of Reach One, Teach One, the information that is provided here, is there anything that's provided to you that is objectionable?
> A: No.
> Q: As it related to the information that's provided on behalf of MCI, Frank Thomas, and other principals or persons or entities who will directly operate and promote bingo gaming for the applicant organization, is there any information provided here that is objectionable to you?
> A: No.

Exh. 1, Sheriff's Depo., pp. 234-36, ln. 5-4.

The Defendant even stated that the information submitted by Reach One, Teach One was more detailed than submitted by Washington Public Elementary, which was at one time a licensed charity. Exh. 1, Sheriff's Depo., pp. 237-38, ln. 11-5.

The Plaintiffs' application substantially complied with the Rules. Exh. 1, Sheriff's Depo., p. 256, ln. 2-6. "Strict observance of a license law … is not required if the facts clearly indicate that the person has substantially complied with the statute and that such compliance has afforded to the obligor the protection contemplated by the statute. Substantial compliance is found if the policy of the licensing statute has been effectively realized." Am. Jur. 2nd § 100 Licenses and Permits (2007). *See* cases cited therein. The Court's findings regarding alleged "deficiencies" with the Plaintiffs' application are clearly contradicted by the Sheriff's sworn deposition testimony, and should not be used by the Court to superimpose enhanced compliance responsibilities on the Plaintiffs that have the effect of erroneously denying them standing to pursue this action.

Contrary to the findings made by the Court, Reach One, Teach One did list Rev. Walter Walker as its Executive Director and Cornelia Walker as its Vice President/Treasurer in its application submitted to the Sheriff. *See* Exh 4, Plaintiffs' Application at Section 9. Therefore, the finding that this information was not provided is clearly erroneous.

The failure to provide "a certified copy of the charter, certificate of incorporation, by-laws, or other evidence of legal existence of the organization" should not be used to penalize Reach One, Teach One because the information is not required in the Sheriff's promulgated Application Forms. The Application Form states:

> "Is this organization tax exempt under Internal Revenue Service regulations?
>
> If so, please attach a copy of the IRS letter ruling or tax exempt determination letter and provide your tax identification number.
>
> ***If not, please answer the following***:
>
> > State the date your organization was formed or incorporated. Has your local organization been in continuous existence since then? If not, give earliest date from which continued existence can be calculated. Attach a copy of your charter or articles of incorporation of your organization."

Exh. 5, Multicultural Center Application (emphasis added). The Application Form clearly states that if the organization is tax exempt under the IRS, ***then*** all that is required is the tax identification number and a copy of the IRS Determination Letter. Reach One, Teach One supplied its tax identification number and the IRS Determination Letter with its application. *See* Exh. 4, Plaintiffs' Application. Nonetheless, it is undisputed that the Plaintiffs produced a copy of Reach One, Teach One's Certificate of Incorporation and Bylaws in response to the Sheriff's First Request for Production of Documents. Exh. 6, Discovery Production.

The Plaintiffs' application supplied the essential information requested by the Defendant in the Application Form for a bingo license and then some. The Sheriff has granted bingo licenses to non-profit organizations that have provided far less information than Reach One, Teach. The Tuskegee Human and Civil Rights Multicultural Center was granted a bingo license in 2003 under the Original Rules. Exh. 5, Multicultural Center Application. The Multicultural Center's application was completed by Deborah Gray, the daughter of Fred Gray and sister of Fred Gray, Jr., who represent the Sheriff and who have an interest in the Macon County Greyhound Park. Exh. 5, Multicultural Center Application. Although the Sheriff's Rules in effect at the time Ms. Gray submitted her application required that information regarding the organization's officers and directors, Ms. Gray provided no statement regarding the organization's officers and directors. Ms. Gray provided no copy of the Multicultural Center's Charter or Articles of Incorporation.

Contrary to the Rules, Ms. Gray's application supplied only the following information:

a. Name of the Organization
b. Address
c. Statement that the organization is tax exempt by the Internal Revenue Service
d. Statement of tax identification number
e. Statement of when incorporated
f. Address of where bingo will be conducted
g. Days of week when bingo will be conducted
h. Times of games
i. Statement of which class of license sought
j. Statement of whether the equipment used is owned or leased
k. Statement of whether the facility used is owned or leased
j. Applicant's Name
l. Date of Birth
m. Social Security Number
n. Driver's License Number
o. Address and Phone Number
p. List of children; mother, father, brothers, and sisters

Reach One, Teach One should not be required to supply greater information than that required of the Gray family or other persons/organizations granted a bingo license in Macon County. *See also* Exh. 1, Sheriff's Depo., pp. 237-38, ln. 11-5 (Sheriff stating that the Plaintiffs' Application was more detailed than Washington Public Elementary School). To do so would further violate Reach One, Teach One's right to equal protection under the laws.

IV. REACH ONE, TEACH ONE IS AN ACTIVE NON-PROFIT ORGANIZATION AND IN GOOD STANDING IN MACON COUNTY

At no time did Rev. Walker ever profess that Reach One, Teach One had the best record keeping and documentation process to evident the organization's charitable services to Macon County. However, Rev. Walker was able to identify a variety of projects and assistance to individuals in Macon County. Rev. Walker's undisputed deposition testimony demonstrates that Reach One, Teach One has provided charitable service to Macon County:

a. Reach One, Teach One was incorporated in 1996. Exh. 7, Walker Depo., p. 11, ln. 7;

b. Reach One, Teach One assisted students in receiving scholarship money for college. Exh. 7, Walker Depo., p. 46, ln. 8-1; p. 47, ln. 4-5;

c. Under the auspices of Reach One, Teach One, Rev. Walker helps organizations obtain 501(c)(3) status. Exh. 7, Walker Depo., p. 74, ln. 10-15;

d. Reach One, Teach One write a proposal for the renovation for an old building in Tuskegee. Exh. 7, Walker Depo., p. 76, ln. 19-23;

e. Reach One, Teach One assisted several people with the payment of electricity and gas bills. Exh. 7, Walker Depo., p. 77, ln. 15-23.

f. Reach One, Teach One distributed $2,000 to three public schools in Macon County. Exh. 7, Walker Depo., p. 105-106;

g. Reach One, Teach One distributed $2,000 to two different day care centers in Macon County – Precious Angels and Little Treasures. Exh. 7, Walker Depo., p. 83, ln. 10-22;

h. Reach One, Teach One has given away cars to people in need of transportation. Exh. 7, Walker Depo., p. 131, ln. 4-8, ln. 11-23; p. 134-35, ln. 21-1.

Further, the Defendant's sworn deposition testimony and his affidavit in support of his Motion for Summary Judgment are in conflict. In his deposition, the Sheriff stated that he believed Reach One, Teach One to be a legal charity with a tax identification number.

Q: You had a problem with Reach One, Teach One?
A: I don't – I don't have a problem with Reverend Walker. I don't know that much about his organization.
Q: But Reverend Walker's attitude and commitment to betterment of mankind and civic activity and involvement would meet some of your minimum tests, wouldn't it?
A: I don't have a problem with Reverend Walker.
...
Q: Did you do any kind of background check on him once you got the application?
A: ***Reach One, Teach One was a – as far as I was concerned, was a legal charity, had a tax id number and all of that***.

Exh. 1, Sheriff's Depo., pp. 269-70, ln. 10-6 (emphasis added).

The Sheriff found no problem with the fact that Reach One Teach One had meager funding since it founding in 1996. It has continuously operated regardless of its financial condition. The Sheriff made no statement that he questioned the validity of Reach One, Teach One or that he suspected that Reach One, Teach One was some "sham organization."

The fact that Reach One, Teach One has no consistent or significant funding is an example of why the organization would benefit from the fundraising services of a bingo license. Not all charitable activities require funding. Without question, devoted charities often provide ministerial, motivational and spiritual guidance to those in need on a shoestring budget or with no money at all.

Rev. Walker's distribution of money from Frank Thomas is no different than what the current Class B Licensees do with the money given to them by the Macon County Greyhound Park. Whether it is helping kids find scholarship money; writing grants; giving $75 to someone in need; it is all service to the people of Macon County. Nowhere in the Sheriff's Original or Amended Rules is there a measuring stick for how many and what kinds of projects a non-profit organization is to complete to qualify as being active and in good standing. Nor is there a requirement in the Sheriff's rules that the charity has to file a federal income tax form in those years when it does not meet the funding threshold for such reporting. The Sheriff's rules and Amendment 744 authorizing the rules are purposely silent on this point.

V. THE PLAINTIFFS HAVE SUFFERED REDRESSABLE INJURIES WHICH CAN BE MADE WHOLE BY THIS COURT

One aspect of Article III standing is the nexus between an injury suffered by the Plaintiff and the ability of the Court to redress that injury. The plaintiff must allege that (1) he has suffered an actual or threatened injury, (2) the injury is fairly traceable to the challenged conduct of the defendant, and (3) the injury is likely to be redressed by a favorable ruling. *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1304 (11th Cir.2006). The Plaintiffs in this action have suffered injuries caused by the Defendant which can be redressed by this Court.

Amendment 744 provides that the operation of bingo gaming in Macon County shall be done for and by nonprofit organizations for charitable, educational or other lawful purposes. Exh. 8, Amendment 744. Amendment 744 places no limitation on the number of charities that have the right to operate bingo in Macon County or the number of qualified locations that can be licensed to conduct bingo gaming. The Sheriff's limitation on the number of charities and the Sheriff's failure to grant a bingo license to the Plaintiffs have effectively denied the Plaintiffs, specifically Reach One, Teach One, the right to operate bingo gaming for charitable, educational or other lawful purposes as allowed by Amendment 744. At the time of the Sheriff's deposition, approximately 62 Class B licenses had been issued, with 60 of those being active. All active licensees are conducting bingo at one qualified location -- Macon County Greyhound Park. Exh. 1, Sheriff's Depo., p. 203, ln. 6-12; p. 214-215, ln. 19-2.

MCI is a surety for Reach One, Teach One for the operation of bingo gaming and it has contracted with Reach One, Teach One to be the qualified location for its bingo gaming. Exh. 4, Plaintiffs' Application. Because of MCI's surety and contractual relationship with Reach One, Teach One, MCI is also injured by the Sheriff's failure to grant the Plaintiffs a license to operate bingo gaming in Macon County. Frank Thomas, as President and Shareholder of MCI, purchased 364 acres of property in Macon that was subsequently optioned to MCI for a $10 million purchase price. Exh. 9, Thomas Depo., pp. 29-31. This property was identified in the Plaintiffs' Application as the designated "qualified location" for the operation of bingo gaming. Exh. 9, Thomas Depo., pp. 29-31; Exh. 1, Plaintiffs' Application. MCI also negotiated for the financing of games. Exh. 9, Thomas Depo., p. 224, ln. 11-17.

Additionally, MCI is injured by the very existence of a bingo gaming monopoly in Macon County that has been purposely created by the Sheriff's and his attorney's rule making and enforcement processes. This form of gaming business protectionism is not specifically authorized in Amendment 744 and other statutory laws, and should not be sanctioned by the Court. Anti-trust law generally recognizes a monopoly and the monopoly's restraint on competition as an injury. *See Northwest Power Products, Inc. v. Omark Industries, Inc.*, 576 F.2d 83, 88 -89 (5^{th} Cir. 1978). The Defendant's arbitrary and impossible rules have prohibited MCI from competing with Macon County Greyhound Park as a qualified location for bingo gaming in Macon County. The Sheriff has testified that under his rules, there is only one facility that can meet the requirements for a qualified location – the Macon County Greyhound Park ("also known as Victoryland").

> Q: Now, sheriff when you were drafting in conjunction with your attorney Section (j), as you have alluded to, the only logical place that could meet this requirement would be Victoryland.
> Isn't that a fair assessment?
> A: At that point in time.
> Q: Yes. Right?
> A: Yes.
> Q: So, wouldn't it be a fair statement that you, in adopting these rules, were adopting them with Victoryland in mind?
> And not saying adopting them. Promulgating them.
> A: That was the only facility in Macon County at that time.

Exh. 1, Sheriff Depo., p. 73, ln. 16-22.

The Sheriff openly admits that his rules have created a gaming monopoly for Victoryland.

> Q: An they're going to be the only ones running Class B bingo gaming in Macon County for the nest five years? Pretty much, right?
> A: I'm saying at this time.
> Q: Yeah. And at Victoryland?
> A: Uh-huh (affirmative).

Exh. 1, Sheriff's Depo., p. 216, ln. 2-8; p. 227, ln. 4-12.

With the declaration that the Sheriff's rules are unconstitutional and the issuance of an injunction directing the Sheriff to grant the Plaintiffs' application, the injuries suffered by the Plaintiffs will then be redressed and corrected.

WHEREFORE, PREMISES CONSIDERED this Court's Memorandum Opinion contained clear errors in the findings of fact, conclusions of law, and Order directed the granting of the Defendant's Motion for Summary Judgment should be reversed on the issue of the Plaintiffs' standing to bring this action. These errors should be corrected and warrant the issuance of an Order denying of the Defendant's Motion for Summary Judgment. The Plaintiffs respectfully request that this Court grant their Motion to Reconsider.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all counsel of record via this Court's electronic filing system on this the 21st day of November, 2007.

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